



## **Pennsylvania Farm Bureau**

510 South 31<sup>st</sup> Street · P O Box 8736 · Camp Hill, PA 17001-8736

Phone: (717) 731-2740 FAX (717) 731-3575 [www.pfb.com](http://www.pfb.com)

November 8, 2010

Water Docket  
Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

**RE: Draft Total Maximum Load (TMDL) for Pennsylvania areas within the Chesapeake Bay watershed – Docket ID No. EPA-R03-OW-2010-0736**

**VIA ELECTRONIC TRANSMISSION ([www.regulations.gov](http://www.regulations.gov))  
AND FIRST CLASS MAIL**

Dear Sir or Madam:

Pennsylvania Farm Bureau ("Farm Bureau") is pleased to provide comments to the Environmental Protection Agency ("EPA"), regarding the aforementioned draft TMDL for the Chesapeake Bay ("Bay") watershed and those areas of Pennsylvania that are considered to be part of the Bay watershed. Farm Bureau is a statewide general farm organization with a membership of more than 50,000 farm and rural families in the Commonwealth. We are the Pennsylvania state affiliate of the American Farm Bureau Federation ("AFBF").

### **Introduction.**

At the outset, we affirm and incorporate as part of our comments the comments that were jointly submitted to EPA and to the respective Bay states by the American Farm Bureau Federation and several other national and regional agricultural organizations ("AFBF et al.") in response to the draft TMDL and Bay states' proposed WIPs. The comments by AFBF et al. raise numerous serious questions and objections, relative to EPA's legal authority under the Clean Water Act to impose types of requirements, restrictions and sanctions that EPA is attempting to impose, not only with respect to the draft TMDL but also with respect to EPA's regulatory actions pursuant to President Obama's Executive Order on the Chesapeake Bay and execution of its Consent Agreement with the Chesapeake Bay Foundation.

The obvious design, objective and regulatory effect behind EPA's recent regulatory administration of the Chesapeake Bay is to exercise direct federal regulatory control of nonpoint pollution source activities and to federally direct the specific means and measures that states are to perform in control of nonpoint source pollution and sanction states that do not implement nonpoint source pollution control programs in a manner that conforms to EPA's expectations. As aptly noted by AFBF et al. in their comments, the federal Clean Water Act expressly and extensively limits EPA's authority to directly regulate individual nonpoint source activities and EPA's authority to directly regulate states' management of nonpoint source control programs.

More specifically, EPA's authority to establish a TMDL under the Clean Water Act does not give EPA authority to impose the type of pervasive regulatory oversight of Bay states in nonpoint source pollution control, as EPA is attempting to do through the draft TMDL, the President's Executive Order, or measures acquiesced by EPA in Consent Agreements.

While comments to follow may try to be more practical and constructive with respect to EPA's draft TMDL and Pennsylvania's draft Watershed Implementation Plan ("WIP") being proposed in response to measures recently taken by EPA, EPA should not read our comments as suggesting EPA is acting legally with respect to the demands that EPA is attempting to place in the development of state WIPs or its attempt to sanction states whose WIPs do not meet EPA's expectations. We continue to assert that EPA has overwhelmingly exceeded its limited authority under the Clean Water Act in measures EPA has taken in its administration of the Bay.

We must also note that Pennsylvania agriculture has a strong history of progress in effective environmental improvement of agricultural operations, even without the nature of federal intervention that EPA has recently attempted. As pointed out in Pennsylvania's draft WIP, during the past 15 years, Pennsylvania has 28 percent of nitrogen reductions, 46 percent of phosphorus reductions and 38 to 46 percent of sediment reductions needed to reach EPA's projected allocations for 2025. Conservation improvements in agricultural practices account for 80 percent of Pennsylvania's nitrogen reductions and 41 percent of nitrogen reductions made by agriculture in the multi-state watershed.

Pennsylvania's efforts to improve water quality in the Bay watershed have had significant measured results. The Executive Summary of Pennsylvania's WIP notes the results of monitoring nutrient and sediment loads at sites within the Susquehanna River basin. The recorded results demonstrate significant decreases in nutrient and sediment loadings along the monitoring sites between 1985 and 2008. Monitoring of the Susquehanna River at Marietta (the exiting water flow for 95% of the Susquehanna River Basin) shows nitrogen loadings have been reduced by 28 percent, phosphorus loadings have been reduced by 23 percent and sediment loadings have been reduced by 40 percent on average. In the Conestoga River, nitrogen loadings have been reduced by 20 percent, phosphorus loadings have been reduced 50 percent, and sediment loadings have been reduced by 70 percent on average.

Pennsylvania's Department of Environmental Protection ("DEP") has also taken several steps very recently to increase the regulatory standards for nutrient and sediment control on farms. Actions such as promulgation of standards for erosion and sedimentation control under Chapter 102 of Pennsylvania's environmental regulations (25 Pa. Code Ch. 102) and proposed changes in standards of management of land application of manure under Pennsylvania's *Manure Management Manual* will enhance nutrient and sediment loading reductions. But unlike the approach taken by EPA, DEP has made a sincere effort to engage participation of the agricultural community in the development and finalization of these standards and has attempted to perform the cost-benefit analysis that should be done to best achieve standards that are both environmentally effective and financially manageable.

The time frame used by DEP in the development and finalization of these standards has been longer than the arbitrarily accelerated period in which EPA has attempted to impose on Bay states in development of state WIPs. But the stakeholders in this process properly

recognized that getting the final product done “right” was more important and more environmentally effective than completing the work under an artificial deadline.

The authoritarian manner that EPA has pursued so far to accomplish nutrient and sediment pollution reduction is counterproductive to the environmental goals that EPA wants to achieve. We in the regulated community also want to achieve these goals in as timely fashion as reasonably possible. And we recognize that in order to do so, there needs to be greater and more concentrated effort among stakeholders to develop and commit resources in implementing effective plans to improve water quality in the Bay. But these goals should not be achieved by economically decimating local communities and mass exodus of farm families from their farms.

EPA has not provided any meaningful analysis of the economic impacts of the regulatory measures it is pursuing in the Chesapeake Bay, from either a regional perspective or from the perspective of individual taxpayers, ratepayers businesses and farms. It makes little practical sense for Bay states to be forced to implement an oppressive plan of environmental response that no one can feasibly afford. A “pollution diet” should not equate to economic starvation. A plan that does not provide affected persons the flexibility and meaningful opportunity to analyze the relative effects of pollution reduction measures and manage and finance the relative costs needed for implementation will not only alienate those for whom EPA has expectations of additional reduction. It will ultimately result in wasteful spending toward activities that have negligible environmental benefit and are capriciously performed under threat of regulatory sanction.

We offer the following comments more specific to the draft TMDL and Pennsylvania’s proposed WIP.

#### **1. The period for development of Pennsylvania’s WIP was drastically too short.**

Recent actions and communications by EPA have strongly suggested that Bay states must develop WIPs that fully meet EPA’s expectations by the Phase 2 deadline, or face immediate federal sanctions. Essentially, states were given a period of less than six months to devise Phase 1 WIPs, and are given until November 1 of next year to both “correct deficiencies” in the Phase 1 WIPs and devise a more detailed WIP that identifies pollution reduction activities and actions that each local area of the state will be performing.

Even with optimum knowledge, personnel and technical resources, completion of a viable and acceptable plan to transform prevailing values and practices in pollution control within the area of the size of the Pennsylvania Bay watershed is a daunting task. So far, states have been provided far less positive and constructive support from EPA to complete this task within the time frame EPA established.

EPA’s deadlines for completion of work by states have been extremely unreasonable and inflexible, and strongly discourage the type of interaction that is needed for development of plans that are both environmentally sound and workable and suitable to those individuals who may be affected. Unfortunately, EPA has viewed the finalization and implementation of WIPs as rigid and static. Yet changes in conditions, finances and technology may reasonably direct a state to make adjustments in plans. The process of development and implementation of activities under WIPs should be a dynamic and continuous one that allows states to make

adjustments when pollution reduction can be achieved in a more efficient and less onerous way.

## **2. There are still significant shortcomings with the Chesapeake Bay Model**

The Chesapeake Bay Model has gone through numerous revisions over the past several years. Still, many analysts have serious concerns over the accuracy of the Model to reflect and measure real world conditions of pollution occurrence. And few facets of the Model have been subject to experience verification that should have occurred to measure the Model's accuracy.

The continuous revision of the Model that has taken place over the past few years also makes it difficult for states and stakeholders to make the type of decisions in committing capital and resources needed to carry out the state's WIP. Many projects for pollution reduction involve the commitment and financing of tens of thousands of dollars or more to implement. The frequency of changes recently made not only discourages decision-makers in having confidence in the Model's reliability. It strongly suggests to those who finance pollution reduction projects and those who rely on these projects for regulatory compliance that investment in these projects is risky.

We also believe there are several categories of best management practices for pollution control and reduction that are not currently recognized and credited in the Model and that should be. The most recent research continues to make a strong scientific case that legacy sediment is a major factor in nutrient and sediment pollution in Pennsylvania.

Finally, we must express strong objection to the Model's failure to recognize any environmental credit for implementation of cover crops in areas which any winter manure application is performed. We believe that such discrediting in the Model is not scientifically or agronomically defensible.

## **3. EPA provided inadequate administrative and technical assistance in development of Pennsylvania's WIP.**

Throughout the past several months, DEP and Pennsylvania stakeholders have been meeting in an active and earnest effort to devise its WIP. Critical to Pennsylvania's ability to make reasoned decisions on proposals for programs to be incorporated in the WIP was the ability of stakeholders to analyze the impacts of various proposals in the Model.

Contrary to what stakeholders were led to believe, EPA has been made little effort so far to provide the type of technical assistance needed to perform this analysis in a timely or meaningful way. Stakeholders have been virtually making blind guesses in predicting the mix of feasible best management practices that will have the greatest environmental returns in EPA's Chesapeake Bay Model. And the period of turnaround for measuring the Model's effects of stakeholders' blind guesses has been unsatisfactorily slow. Pennsylvania and the Bay states continue to be largely left in the dark in their effort to devise an environmentally sound and economically viable implementation plan through analysis of the Model.

**4. EPA has provided no meaningful guidance or constructive feedback in response to proposals offered in the course of WIP development.**

EPA has provided little meaningful or concrete feedback to more specific measures for pollution control within Pennsylvania's agricultural sectors that DEP has proactively proposed and offered for consideration. And what little feedback DEP has received has been predominantly negative, and largely devoid of practical or feasible recommendations to address EPA's concerns.

**5. EPA's expectation that states must provide "reasonable assurance" today that they will fully and timely meet every phase of their WIP's goals and objectives is unreasonable.**

EPA has also failed to provide any expressed guidance or criteria that EPA is applying or that states should apply in assessing whether a state's WIP is providing "reasonable assurance" that the nutrient and sediment reductions goals will be attained through actions and programs proposed in the WIP or that the state has the capability of carrying out the actions and programs proposed. In addition to our concern of whether EPA has legal authority to mandate "reasonable assurance" in state WIPs, we strongly believe the absence of any measured guidance or criteria makes EPA's determinations largely arbitrary.

In addition, actions that have been taken so far by EPA in response to the question suggests that EPA has the bar of "reasonable assurance" unreasonably and unworkably high. By its actions so far, we believe EPA has equated "reasonable assurance" to a virtual guarantee by the state that it will enact all future legislation and will commit all economic resources to fully accomplish every facet of actions and programs proposed in the state's WIP. Such an interpretation is wholly out of touch with the political realities that arise in the course of normal governmental function and with the economic and fiscal uncertainties that normally exist in the normal course of national and local economies and are particularly prevalent in today's economic downturn.

In its effort to "save the Bay", EPA must also strive to preserve the livelihoods of those who work and reside in the Bay watershed. "Reasonable" assurance does not, and should not, mean "absolute" assurance, and EPA should apply a standard that is much more pragmatic and realistic of political and economic uncertainties than it appears to be applying.

**6. Extent of pollution control measures being performed in Pennsylvania is understated in the Model, and EPA has so far failed to provide a reasonable means for reporting and crediting of those activities.**

Recently completed studies of farming and crop land practices in Lancaster County and Bradford County confirm that the Chesapeake Bay Model is seriously failing to capture and credit the extent of best management practices being performed on Pennsylvania farms, particularly in the use of conservation tillage practices and cover crop production. Yet, EPA has provided virtually no guidance to Pennsylvania or other Bay states on a feasible methodology for reporting, collection and of these practices that is acceptable to EPA. And EPA has shown little interest so far in accepting any methodology for reporting and crediting of agricultural best management practices in the Model other than an unworkable and cost-

prohibitive methodology of personal inspection and verification of vast acreage of farmland by "qualified" individuals.

Statistical methodologies and similar methodologies universally accepted as providing accurate and credible measurement of actual occurrence refute the need for the type of reporting and crediting system for best management practices on farms that requires every acre of ground to be inspected and verified. And we strongly believe that the scope of "qualified" persons used under an acceptable methodology should be much broader than regulatory and enforcement personnel, and include state and local governmental officials and those in the private sector who provide management, consulting and custom services for farmers.

EPA needs to recognize more feasible and flexible methodologies for reporting and capture of agricultural best management practices in the Chesapeake Bay Model than those suggested so far.

#### **7. EPA's preoccupation with legal compliance of farms is misplaced and will not efficiently manage limited financial resources .**

EPA seems to be unduly insisting that aggressive regulatory and enforcement measures to invoke legal compliance by all Pennsylvania farms be a major component of Pennsylvania's WIP. While we are not advocating that Pennsylvania farms be operated in a manner that does not achieve baseline compliance, we have significant concerns over the extreme focus EPA is giving to this facet of the WIP and the detrimental effects that this focus will have in diverting state and federal resources from proven programs of nutrient and sediment reduction on farms.

EPA has not offered any meaningful analysis of the effect of full achievement of legal compliance on farms will have in attaining nutrient and sediment reduction in the Chesapeake Bay. Our analysis of the Chesapeake Bay Model's measured effect of full legal compliance by all Pennsylvania farms would indicate that full compliance would only attain modest reduction in nitrogen, phosphorus and sediment pollution.

While we do have concerns with DEP's most recent proposals to ramp up investigation and regulatory enforcement activities in Pennsylvania's agricultural sector, we are troubled by the extreme degree of disapproval expressed by EPA in response. In the abstract, the focus of DEP's plan to direct more financial and administrative resources to those stream areas considered to be most seriously impacted from agricultural activity seems to make basic sense. In its response, EPA failed to offer any constructive suggestions to address its criticism of DEP's approach.

We also believe that both EPA and DEP are overly focused on regulatory compliance activities, relative to DEP's proposed "targeted watershed approach." If a targeted watershed or similar approach is to be utilized, there must be a thorough and quantified analysis of nutrient and sediment loadings that are actually occurring from individual farms within the watershed. Regulatory actions that merely focus on legal compliance of individual farms within a local watershed may not be nearly as cost-efficient or environmentally effective as more holistic measures to coordinate conservation practices among groups of farmers in the targeted watershed.

**8. EPA's preoccupation with imposing federal permitting requirements on all farms is counterproductive to environmental quality.**

EPA seems to be preoccupied with regulating all of Pennsylvania's animal farms as Concentrated Animal Feeding Operations ("CAFOs") and requiring all Pennsylvania farms to obtain National Pollutant Discharge Elimination System ("NPDES") permits as a condition for farm operation. Frankly, this is regulatory overkill. Most smaller family farms cannot afford the thousands of dollars of additional costs they will absorb to attain the services needed in the formal presentation and approval of NPDES permits. And these additional costs will unnecessarily divert monies that could be otherwise used to carry out environmental practices identified in manure management and soil conservation plans.

We believe the marginal environmental benefits to be attained under a directive for NPDES permitting of all animal farms does not justify the commitment of the high costs that Pennsylvania farmers would need to incur.

**9. Federal standards for nutrient credit trading should not contradict the rules and standards already established under state programs.**

As EPA is aware, Pennsylvania has established a state program for trading of nutrient and sediment credits. This program is currently in operation, and numerous transactions for trading of credits have already been made. Pennsylvania and its stakeholders worked effectively and cooperatively in the creation of this program and the formation of the governing rules of nutrient trading to facilitate participation by potential buyers and sellers and encourage programs and practices for overall reduction in nutrient and sediment pollution.

Farm Bureau strongly believes that Pennsylvania's nutrient trading program is a legitimate and viable program that will provide significant future opportunities for implementation of economically and environmentally effective programs among public and private sectors in the Bay watershed. However, for this program to be successful, both buyers and sellers of nutrient trading must have high confidence that today's governing rules for generation of tradable credits will not be generally compromised in the future or compromised by application of "special" rules. Those who must rely on purchase of credits to attain legal compliance will not be willing to make the significant commitment of money to purchase credits if they fear the rules might be changed to make their credits unusable. And those who may be able to generate credits through best management practices will not be willing to incur the significant costs necessary to implement these practices if they fear the rules might be changed to reduce or eliminate the credits that may be generated.

We have concerns from EPA's recent administrative activities and communications that Pennsylvania's nutrient trading program will be seriously compromised under EPA's future demands of this program. We particularly are concerned that EPA might try to unilaterally superimpose unworkable nutrient trading rules, excessive prerequisites for trading and dismal limitations in the number of tradable credits to be generated from best management practices.

Where trades have already occurred and credits pursuant to trades have been legitimately generated under Pennsylvania's current trading rules, those credits purchased and relied on by the purchaser must be given full faith and credit toward the purchaser's regulatory compliance, regardless of any future changes in trading rules and standards.



We are also seriously concerned with EPA's consideration to impose additional threshold requirements for attainment of TMDL loadings by individuals, land use sectors and regions as a prerequisite for generation of tradable credits from best management practices. These requirements would soundly discourage participation in nutrient trading to achieve regional nutrient and sediment reductions, and will stifle proactive efforts to direct capital resources toward environmental programs, which can be fostered through nutrient trading.

## **Conclusion**

Pennsylvania's proposed WIP is the product of a reasonable and good-faith effort made jointly by the Commonwealth and Pennsylvania's public and sectors to devise a meaningful and effective game plan for future nutrient and sediment reduction in the Bay watershed. Especially given the severe time constraints to develop and submit the Phase 1 WIP and the serious lack of guidance or meaningful assistance provided by federal officials in its development, we believe Pennsylvania's WIP will effectively move Pennsylvania toward the nutrient and sediment reduction goals that EPA would like to see accomplished by 2025. And we and other stakeholders who assisted in the WIPs development sincerely believe that it can be fully implemented without bankrupting public coffers and farm families.

EPA has publicly stated that it wants to "partner" with Bay states in developing and implementing effective implementation plans and milestones for pollution reduction. To this point, we have seen little effort by EPA to work "in partnership" with states and affected stakeholders in this effort.

We have stated numerous times at public meetings held pursuant to Pennsylvania's WIP that the process of developing a workable and effective plan is a **trial-and-error** process. Basic common sense should cause EPA officials to realize it is hardly possible to develop a perfect and fully guaranteed plan to correct pollution ills of the Chesapeake within the timeframe EPA has imposed upon states in finalizing their WIPs. Sufficient time needs to be provided to analyze ideas that are proposed and to correct or provide more detailed information in response to perceived errors and deficiencies.

In this regard, we are disappointed by EPA's initial reaction to Pennsylvania's proposed WIP, and hope that EPA will act in the future more in the spirit of partnership with Pennsylvania, will take a less onerous approach in administration of pollution control in the Bay, and will provide the type of constructive and technical assistance that states should have had in the first place in further revision of state WIPs.

Sincerely,

  
John J. Bell  
Governmental Affairs Counsel

  
William A. Neilson  
Natural Resources Director